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Supreme Court, U.S.
FILED
OCT 2 9 2004
OFFICE OF THE CLERK

No. 04-186

In The
Supreme Court of the United States

PAULINE KOZIARA, and
KATHLEEN DeRIENZO,

Petitioners,

vs.

SEMINOLE COUNTY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari
To The Florida Fifth District Court Of Appeal

PETITIONERS' REPLY TO RESPONSE IN OPPOSITION TO A WRIT OF CERTIORARI

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IT IS ILLOGICAL TO ARGUE THAT A LEGISLATIVE RECORD EXISTS WHICH CAN BE USED TO UPHOLD THIS ORDINANCE WHEN THE ORDINANCE WAS REJECTED BY THE LEGISLATURE

In their brief, the petitioners explained in great detail that Seminole County's "public decency" ordinance was repeatedly rejected by the Seminole County Commission. In response, Mr. Nelson claims that the petitioners are "misrepresenting the record" by making misstatements of fact. However, the fact remains, the county commission's decision to reject the ordinance was trumped and overruled by a political action committee called Seminole County Citizens for Public Decency which gathered the required signatures to create a binding political referendum.

The cavalier statements by the county can be quickly rebutted by reviewing the ordinance attached to the petitioners' brief (Appendix E). There, at the top of the first page, next to the heading **"Editor's Note,"** the ordinance reflects that it was initiated by the Seminole County electorate, pursuant to the Seminole County Home Rule Charter (signatures and binding referendum), and ultimately passed after a majority of the electorate voted in favor of the ordinance. Thereafter, the Seminole County Commission was required to declare the ordinance passed.

What is equally disturbing is that these same inflammatory tactics were employed by the county's attorney during the trial. Mr. Nelson[1] argued that the ordinance

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[1] Mr. Nelson, who spearheads an entity known as the American Liberties Institute, agreed to represent the county without fees or costs.

was passed by the legislature – when it was not. At one juncture, the trial judge became angry and stated:

> The Court: Only this morning I recollected that this ordinance was passed by referendum. **And I wondered rhetorically if anything the county considered is relevant since they never passed the ordinance.**

(MR11/133).

* * *

> The Court: **Why do I feel like I'm being tricked? They either passed the damn ordinance or they didn't.**

(MR11/139).

* * *

> The Court: You are twisting my words. The County Commission voted to put it on the ballot.
>
> Mr. Nelson: Yes, your honor.

(MR11/144).

In other words, once the PAC gathered the required signatures to place the ordinance on the ballot, the county commissioners could not stand in its way, and, after it was passed, the county charter required that the commission declare it passed.[2]

Obviously, if the legislature wanted to pass the ordinance, there would be no necessity for a signature petition drive or a binding referendum. The unique interpretation

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[2] All of the minutes from the county commission meetings were moved into evidence at the trial and it is these documents which are referenced in the petition addressing the procedural history of the ordinance.

of the record employed by respondent's counsel is also manifest in his description of the trial court's assessment of Dr. George's testimony. For instance, the county argues that Dr. George's testimony was accepted by the court, rather than rejected as advanced by the petitioners. A simple review of the judge's order, attached to the petition as Appendix B, exemplifies the spin employed here.

> It is disappointing to realize that the federal government has wasted the tax payers' money on this **ridiculous research**. If Dr. George truly takes himself seriously, then perhaps he should, like the Emperor in the tale by Hans Christian Anderson, **check to see if his science is clothing or in his imagination**.

App. B at n. 2 (Emphasis added).

In addition, during the trial, the judge questioned Dr. George directly which highlighted the fact that Dr. George had never heard of the concept of adverse secondary effects before being hired in this case.

> Dr. George: Because the reality is that as Mr. Mason pointed out I had never heard the phrase adverse secondary effects before this case.
>
> The Court: Okay. Well, let me help you just a second before you answer because I know about it.
>
> Dr. George: Okay.

(T5/808).

Likewise, the county argues that its concession on property values is immaterial because the ordinance did not make reference to that issue. If this were so, why does the ordinance contain the following language?

> Whereas, the citizens of Seminole County desire to protect and preserve the wholesome character

> of Seminole County as a family oriented community with a **high quality of life offered for families, tourist and businesses**;

(R7/1073) (Emphasis added).

> [w]orking directly against Seminole County's **economic development** and tourism development activities; . . .

(R7/1076) (Emphasis added).

The reports tendered by the petitioners' experts, Dr. Fisher and Richard Schauseil, address commerce, residential property values, whether people were deterred from visiting the areas where the adult clubs are located, economic development and commercial property values. Faced with this overwhelming data, the city and county capitulated and conceded that the ordinance could not withstand a challenge based upon these economic issues.

Moving past all of this, this court can see from reviewing the trial court's order (upheld by the district court of appeal), that the finder of fact rejected Seminole County and Casselberry's evidence. To the contrary, Seminole County continues to argue that Lieutenant Allen's testimony regarding the prostitute decoy supports the ordinance. Again, this evidence was rejected by the finder of fact.

> Some of the testimony revealed anecdotal, rather than scientific studies. A lieutenant from the Seminole County Sheriff's Department[3] testified that he was in charge of an exercise in which a female deputy posed as a prostitute and stood near the intersection of highway 17-92 and highway 436 in the city. The intersection of those

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[3] Referring to Lieutenant Allen.

> two highways is one of the busiest in the state of Florida and is near the location of the Club Juana. Not surprisingly, the female deputy was attracting more than passing attention from some of the motorists driving by. Then she moved some distance down highway 17-92 to the entrance of a residential subdivision and, after an hour, she only attracted the city police, who received a complaint from one of the neighborhood residents about her presence.
>
> It was admitted this exercise was not scientific and **the court gives no credibility to it** for proof that the Club Juana or any other adult club in the area produces adverse secondary effects. Prostitution, after all, has been around for thousands of years and is not caused by adult clubs any more than it is caused by hotels or Internet websites.

App. B (Emphasis added).

Finally, a brief word should be said about Dr. Terry Danner, one of the plaintiffs' experts. Dr. Danner analyzed data from all of the adult nightclubs in Seminole County – they are all located in Seminole County and the ordinance applies countywide even within the local municipalities. His testimony spans hundreds of pages and addresses both local and state criminal data. It was accepted by the trial judge. "His testimony cast more doubt . . . "[4] Regarding why Seminole County's ordinance was passed, Dr. Danner explained, "It's public opinion, it's political influence, it's not science. It's just opinion." (MR14/614-615). In fact,

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[4] Although this quote references the city's evidence, it should be remembered that the evidence presented by the city and the county was presented and adopted jointly by both Casselberry and Seminole County.

there is no way to determine from an objective standpoint why the community passes a law in an election.

Finally, the city and the county presented evidence that there was an undercover investigation at one of the Seminole County nightclubs, Rachel's, and arrests occurred. That evidence is flawed for a number of reasons. First, the county made no effort to compare this data with any other non-adult venue. Yet, that is exactly what the petitioners' expert did. Dr. Danner provided global statistics for the entire county and city, addressing crime both before and after the ordinance(s) as well as trends in crime, rape statistics, index crime statistics, et cetera. The county also fails to point out that the testimony from Mr. Mulrenin also included his statement that the owners of the Rachel's nightclub were adamantly opposed to drugs.

> Q. And do I also take it that the people who own Rachel's they didn't want drugs or narcotics? In other words, **these people were opposed to drugs**? Do I also understand that right? Is that what you told me in deposition?
>
> A. **Right.**
>
> Q. They didn't like drugs. They didn't want anything to do with drugs, and they didn't want them in the business?
>
> A. Correct.

(MR16/1121-1122).

The county also fails to tell the court that the lead investigator in the "Rachel's investigation" was investigated by his own department for having a sexual relationship with one of the dancers he supposedly was investigating and prosecuting. In other words, the police had less than clean hands in this "investigation."

> Do you know if ultimately Mr. Laney was investigated by the Internal Affairs Department by having a sexual relationship with a dancer that he investigated and prosecuted?

(R16/1042).

* * *

> It's the same question. That's not relevant to the validity of the ordinance.
>
> Mr. Mason: I mean I understand you're probably right I'm just trying to do a little credibility here to show that a lot of money spent, a lot of things going on with the police. That the police don't have clean hands in this. That the reasonable person might conclude that they have unclean hands. **They're going in over there for six months. Pumping the money to them. Then they're having sex with people they're prosecuting. I mean, they're having sex.**
>
> The court: **You made your point. I got it.**

(R16/1043).

THE *ALAMEDA BOOKS'* STANDARD[5]

There are a great many reasons why this court should accept this case. First, it provides the court a concrete opportunity to address the *Alameda Books'* standard in the context of a trial on the merits. Second, the lower court evaluated the strength and credibility of the city and county's evidence and

[5] *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

rejected it. Rather, the court upheld the city's ordinance based upon political reasoning that these ordinances could be upheld based upon political equity (if a neighboring community had already enacted such an ordinance), and, as an after thought, stated that Seminole County's ordinance could be upheld based upon its preamble. However, that statement contradicts *Alameda Books*. Once the ordinance was challenged and the plaintiffs cast doubt upon it, it was Seminole County's requirement to place credible evidence in the record to uphold it. That did not occur. This flaw in the court's reasoning is exacerbated by the fact that the Seminole County ordinance has no pre-enactment legislative record – because same was rejected by the commissioners. There was no evidence presented at the "ballot box," rather, voters were asked to vote for or against "public decency." Aside from this, only a handful of materials were filed which were presented to the commissioners such as the meeting minutes and a package prepared by the American Family Association.[6]

THE COUNTY FAILS TO ADDRESS THE BATHING SUIT REQUIREMENT UNDER *PAP'S*, *ALAMEDA BOOKS*, AND *PEEK-A-BOO LOUNGE*

Seminole County's ordinance requires exotic dancers to wear **bathing suits**. The county has never advanced

[6] The county provides a string cite at the bottom of page five of its response. These are citations to the commission meeting minutes, documents tendered by Lieutenant Allen, a neighboring county ordinance on public nudity, speaker lists and comments from the commission meetings, and the American Family Association documents. This is far from a voluminous legislative record and, from a relevance standpoint, it must be repeated that when faced with these materials, the county commission repeatedly voted the ordinance down.

any secondary effects justification as to why a bathing suit requirement was chosen (i.e. compared to a g-string requirement). Even before this court, Seminole County does not address the issue head-on. The county ignores it.

A central point in this petition is whether the bathing suit requirement imposed on exotic dancers violates the fourth prong of *United States v. O'Brien,* 391 U.S. 367 (1968) as discussed by Justice O'Connor in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and by the Eleventh Circuit in *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003). Even before this Court, the city does not attempt to justify this highly restrictive bathing suit ordinance. Rather, its response is silent on the subject.

This court has never upheld a bathing suit requirement. The Eleventh Circuit all but invalidated one in *Peek-A-Boo,* and the Seventh Circuit recently invalidated an ordinance which also addressed heightened clothing attire. See *R.A.V. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004). Here, the trial judge accepted Dr. Hanna's statement that this amount of clothing destroys the erotic message conveyed in a striptease act. This point was accepted by the trial court and affirmed by the state Court of Appeal. Considering this, how could the ordinance be upheld?

THE FIFTH DISTRICT AFFIRMED THE TRIAL JUDGE'S ORDER. THAT DECISION IS WITHIN THIS COURT'S JURISDICTION

Ms. Koziara and Ms. DeRienzo could not seek review with the Florida Supreme Court based upon a per curium affirmance issued by the state District Court of Appeal. In 1980 the Florida Constitution was amended abolishing "certiorari review" at the Florida Supreme Court and

replacing it with a more narrow form of review called "discretionary review." See generally *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). As such, the Koziara/DeRienzo PCA was not reviewable by the Florida Supreme Court and the Fifth District Court's decision is a final reviewable decision in this case.

The county now incorrectly argues that this court is likewise foreclosed from reviewing a PCA from a state District Court. The Supreme Court of the United States is a court of certiorari review not a more narrow form of review as described in the Florida Constitution. Furthermore, this Court recently granted a petition for writ of certiorari from the same Florida Court of Appeal from the issuance of a PCA. See *Corona v. Florida*, 124 S.Ct. 1658 (2004).

CONCLUSION

Courts and litigants across this country need guidance and instruction from this Court on the full import of the *Alameda Books*' standard. See generally, *J.L. Spoons, Inc. v. Morckel*, 314 F.Supp.2d 746, 755-757 (ND OH 2004) ["clearer guidance in this area would greatly aid the court . . . "]. That is one of the reasons it is so important for this Court to accept and review this case.

Respectfully submitted this 29th day of October, 2004.

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